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Paper No. 9

Meir Ibguy
632 Kings Hwy, apt. 3C
Brooklyn NY 11223

COPY MAILED

MAY 19 2004

In re Application of	:	OFFICE OF PETITIONS
Ibguy	:	
Application No. 10/002,888	:	DECISION DISMISSING
Filed: January 30, 2002	:	PETITION
Attorney Docket No. N/A	:	
FOR: DEVICE FOR DISTRIBUTING		
ANTIBACTERIAL SPRAY IN A HUMAN		
SHOE		

This is a decision on the petition entitled, "PETITION TO REVIVE THE APPLICATION, filed April 12, 2004. The petition is captioned as a petition to revive and petitioner has provided speculation as to why the application became abandoned. However, because no petition fee was submitted, the petition can only be treated under 37 CFR 1.181 as a petition to withdraw the holding of abandonment.

The petition under 37 CFR 1.181 is **DISMISSED**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to timely reply to the non[-final Office action mailed December 18, 2002, which set an extendable period for reply of three (3) months. Having obtained no extensions of time under 37 CFR 1.136(a), this application became abandoned on March 19, 2003. A Notice of Abandonment was mailed on July 17, 2003.

Petitioner alleges that he did not receive the December 18, 2002 non-final Office action.

The showing required to establish nonreceipt of an Office communication must include:

1. A statement from the practitioner stating that the Office communication was not

received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received.

2. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.¹

A review of the record indicates no irregularity in the mailing of the December 18, 2002 non-final Office action, and in the absence of any irregularity there is a strong presumption that the communication was properly mailed to the applicant at the correspondence address of record. This presumption may be overcome by a showing that the aforementioned communication was not in fact received.

Petitioner has not proven nonreceipt because (1) petitioner did not include a statement that a thorough search of the file jacket and docket records was conducted and (2) petitioner did not include a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed.

It is noted that petitioner is a *pro se* applicant. Thus, petitioner may not have a formal docketing system. However, petitioner must provide the Office with evidence to prove the allegation of non-receipt.

In any renewed petition, (1) petitioner must state that the Office communication was not received and that he searched the place where he normally would keep such communications and couldn't find it. (2) Petitioner must explain his system for keeping track of patent matters -- where he keeps the correspondence (Does petitioner have a file where he keeps correspondence pertaining to this application?), where he writes down due dates (This need not be a log. This may be in the form of a calendar or a date book), how he knows replies are due, etc. In essence, petitioner must explain how he reminds himself of response due dates. The Office would like to see documentary evidence and records as may exist which would substantiate that petitioner did not receive the December 18, 2002 non-final Office action.

Since petitioner states that he did not receive the December 18, 2002 non-final Office action, a copy is enclosed.

ALTERNATIVE VENUES

If petitioner is unable to prove that he did not receive the December 18, 2002 non-final Office action, petitioner can pursue one of the following two options.

(1) Petitioner may wish to file a petition under 37 CFR 1.137(a) -- the unavoidable standard.

¹ See notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by (1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof; (2) the petition fee as set forth in § 1.17(l) -- \$55.00; and (3) a **showing** to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable.

Documentary evidence is the key to proving unavoidable delay.

OR

(2) Petitioner may wish to file a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an “unintentionally” abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was “unavoidable.” This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An “unintentional” petition under 37 CFR 1.137(b) must be accompanied by (1) the required reply to the December 18, 2002 non-final Office action; (2) the \$665.00 petition fee; and (3) a statement to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

For petitioner's convenience, blank copies of the 2 types of revival forms are enclosed with this decision.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITION
Commissioner for Patents
Post Office Box 1450
Alexandria, VA 22313-1450

By hand: Crystal Plaza 1 Lobby
2011 South Clark Place
Room 1B03
Arlington, VA 22202

By FAX: (703) 872-9306
ATTN: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (703) 308-6712.



E. Shirene Willis
Senior Petitions Attorney
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

Enclosures: December 18, 2002 non-final Office action

blank PTO/SB/64 -- PETITION FOR REVIVAL OF AN APPLICATION FOR
PATENT ABANDONED UNINTENTIONALLY UNDER 37 CFR 1.137(b)

blank PTO/SB/61 -- PETITION FOR REVIVAL OF AN APPLICATION FOR
PATENT ABANDONED UNAVOIDABLY UNDER 37 CFR 1.137(a)

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